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Supreme Court of the United States

October Term, 2003

SHAFIQ RASUL, ET AL.,

Petitioners,

v.

GEORGE W. BUSH, ET AL.,

Respondents.

KHALED A. F. AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE FRED KOREMATSU IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

More than sixty years ago, as a young man, Fred Korematsu challenged the constitutionality of President Franklin Roosevelt's 1942 Executive Order that authorized the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. In *Korematsu v. United States*,[2] this Court upheld his conviction, explaining that because the United States was at war, the government could constitutionally intern Mr. Korematsu, without a hearing, and without any adjudicative determination that he had done anything wrong.

More than half a century later, Fred Korematsu was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for his courage and persistence in opposing injustice. In accepting this award, Mr. Korematsu reminded the nation that "We should be vigilant to make sure this will never happen again." He has committed himself to ensuring that Americans do not forget the lessons of their own history.

Because Mr. Korematsu has a distinctive, indeed unique, perspective on the issues presented by this case, he submits this brief to assist the Court in its deliberations.

SUMMARY OF ARGUMENT

For approximately two years, Petitioners have been imprisoned incommunicado, without access to counsel and with no opportunity to contest in any forum the factual or legal basis for their confinement. Unlike Fred Korematsu, who, as a Japanese-American internee, was at least permitted

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

[2] 323 U.S. 214 (1944).

to challenge the constitutionality of his internment, Petitioners are being deprived of the most basic components of due process.

The United States Government has defended these deprivations on the technical ground that federal courts lack reviewing jurisdiction because the Government has decided to incarcerate Petitioners on a military base over which it purports to disclaim "sovereignty." But the basis for that defense – the Government's voluntary decision to incarcerate Petitioners at Guantanamo Bay, thousands of miles from any battlefield – suggests a legal strategy, not a military one.

Although certain aspects of the "war against terrorism" may be unprecedented, the challenges to constitutional liberties these cases present are similar to those the nation has encountered throughout its history. The extreme nature of the Government's position here is all too familiar as well. When viewed in its historical context, the Government's position is part of a pattern whereby the executive branch curtails civil liberties much more than necessary during wartime and seeks to insulate the basis for its actions from any judicial scrutiny. *E.g.*, *Korematsu*, *supra*. Only later are errors acknowledged and apologies made. *E.g.*, *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866) (holding that the writ of *habeas corpus* had been wrongfully suspended during the Civil War); Proclamation No. 4417, 41 Fed. Reg. 35,7741 (Feb. 19, 1976) (acknowledging wrongfulness of internment of Japanese-Americans).[3]

It is no doubt essential in some circumstances to modify ordinary safeguards to meet the exigencies of war. But history teaches that we tend to sacrifice civil liberties too

[3] As President Ford stated in his proclamation, "I call upon the American people to affirm with me this American promise – that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated." *Id.*

quickly based on claims of military necessity and national security, only to discover later that those claims were overstated from the start. Fred Korematsu's experience is but one example of many in which courts unnecessarily accepted such claims uncritically and allowed the executive branch to insulate itself from any accountability for actions restricting the most basic of liberties.

Fortunately, there are counterexamples. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court invalidated President Truman's nationalization of the steel mills during the Korean Conflict, despite the Commander-in-Chief's insistence that his actions were necessary to maintain production of essential war material. During the Vietnam War, this Court rejected a Government request to enjoin publication of the Pentagon Papers, refusing to defer to executive branch claims that publication of this top-secret document would endanger our troops in the field and undermine ongoing military operations. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

In deciding the cases now before it, this Court should follow the tradition those cases represent, not the one exemplified by *Korematsu*. To avoid repeating the mistakes of the past, this Court should reverse the decision of the District of Columbia Circuit and affirm that the United States respects fundamental constitutional and human rights – even in time of war.

ARGUMENT

Since September 11th, the United States has taken significant steps to ensure the nation's safety. It is only natural that in times of crisis our government should tighten the measures it ordinarily takes to preserve our security. But we know from long experience that the executive branch often reacts too harshly in circumstances of felt necessity and underestimates the damage to civil liberties. Typically, we

come later to regret our excesses, but for many, that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.

As Fred Korematsu's life story demonstrates, our history merits attention. Only by understanding the errors of the past can we do better in the present. Six examples illustrate the nature and magnitude of the challenge: the Alien and Sedition Acts of 1798, the suspension of *habeas corpus* during the Civil War, the prosecution of dissenters during World War I, the Red Scare of 1919-1920, the internment of 120,000 individuals of Japanese descent during World War II, and the era of loyalty oaths and McCarthyism during the Cold War.

I. THROUGHOUT ITS HISTORY, THE UNITED STATES HAS UNNECESSARILY RESTRICTED CIVIL LIBERTIES IN TIMES OF STATED MILITARY CRISIS

History teaches that, in time of war, we have often sacrificed fundamental freedoms *unnecessarily*. The executive and legislative branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security. Courts, which are not immune to the demands of public opinion, have too often deferred to exaggerated claims of military necessity and failed to insist that measures curtailing constitutional rights be carefully justified and narrowly tailored. In retrospect, it is clear that judges and justices should have scrutinized these claims more closely and done more to ensure that essential security measures did not

unnecessarily impair individual freedoms and the traditional separation of powers.

A. The Alien and Sedition Acts of 1798

In 1798, the United States found itself embroiled in a European war that then raged between France and England. A bitter political and philosophical debate divided the Federalists, who favored the English, and the Republicans, who favored the French. The Federalists were then in power, and the administration of President John Adams initiated a sweeping series of defense measures that brought the United States into a state of undeclared war with France.[4]

The Republicans opposed these measures, leading Federalists to accuse them of disloyalty. President Adams, for example, declared that the Republicans "would sink the glory of our country and prostrate her liberties at the feet of France."[5] Against this backdrop, and in a mood of patriotic fervor, the Federalists enacted the Alien and Sedition Acts of 1798.

The Alien Friends Act empowered the President to deport any non-citizen he judged to be dangerous to the peace and safety of the United States. The Act applied to citizens or subjects of nations with whom we were not in a state of declared war. The Act accorded individuals detained under the Act no right to a hearing, no right to present evidence and no right to judicial review.[6] Congressman

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[4] James Rogers Sharp, *American Politics in the Early Republic: The New Nation in Crisis* 5 (1993); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* 195 (1975).

[5] Letter from John Adams to the Inhabitants of Arlington and Bandgate, Vermont (June 25, 1798), in 9 *The Words of John Adams* 202 (Charles Francis Adams, ed., 1954).

[6] *See* Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (expired by its own terms 1800). The Alien Enemies Act, which was adopted at the same

Edward Livington aptly observed in opposition to the Act that with "no indictment; no jury; no trial; no public procedure; no statement of the accusation; no examination of the witnesses in its support; no counsel for defence; all is darkness, silence, mystery, and suspicion."[7]

The Federalists clearly could have achieved their legitimate goals in dealing with aliens without stripping them of fundamental procedural protections. Their decision to go well beyond the demands of the moment has been judged harshly by history. The Alien Friends Act expired on the final day of President Adams's term of office, and has never been renewed.

The Sedition Act of 1798 prohibited criticism of the government, the Congress or the President, with the intent to bring them into contempt or disrepute.[8] The Act was vigorously enforced, but only against supporters of the Republican Party. Prosecutions were brought against the most influential Republican newspapers and the most vocal critics of the Adams administration.[9]

The Sedition Act also expired on the last day of Adams's term of office. The new President, Thomas Jefferson, pardoned those who had been convicted under the

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time, provided that, in the case of a declared war, citizens or subjects of an enemy nation residing in the United States could be apprehended, detained and either confined or expelled at the direction of the President. This Act has remained a permanent part of American wartime policy. *See* Alien Enemies Act, ch. 66, 1 Stat. 577 (1798).

[7] 8 *Annals of Congress* 2006-11 (1798).

[8] *See* Sedition Act of 1798, ch. 73, 1 Stat. 596 (1798) (expired by its own terms 1800).

[9] *See* John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (1951); James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956).

Act, and forty years later Congress repaid all the fines.[10] The Sedition Act was a critical factor in the demise of the Federalist Party, and since that time, the Supreme Court has often reminded us that the Sedition Act of 1798 has been condemned as unconstitutional in the "court of history."[11]

B. The Civil War: The Suspension of *Habeas Corpus*

During the Civil War, the nation faced its most serious challenge. There were sharply divided loyalties, fluid military and political boundaries, and easy opportunities for espionage and sabotage. In such circumstances, and in the face of widespread and often bitter opposition to the war, the draft and the Emancipation Proclamation, President Lincoln had to balance the conflicting interests of military necessity and individual liberty.

During the course of the war, Lincoln suspended the writ of *habeas corpus* on eight separate occasions. Some of these orders were more warranted than others. The most extreme of the suspensions, which applied throughout the entire nation, declared that "all persons . . . guilty of any disloyal practice . . . shall be subject to court martial."[12] Under this authority, military officers arrested and imprisoned as many as 13,000 civilians, with no judicial proceedings and no judicial review.[13]

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[10] Cong. Globe, 26th Cong, 1st Sess. 411 (1840). *See also* H.R. Rep. No. 26-86 (1840).

[11] *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

[12] Abraham Lincoln, 5 *The Collected Works of Abraham Lincoln* 436-437 (Roy P. Basler, ed., 1956).

[13] *See* Daniel Farber, *Lincoln's Constitution* 157 (2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties*

In 1866, a year after the war ended, the Supreme Court ruled in *Ex parte Milligan*[14] that Lincoln had exceeded his constitutional authority, and held that the President could not constitutionally suspend the writ of *habeas corpus*, even in time of war, if the ordinary civil courts were open and functioning. The Court rejected the Government's argument that due to the war, the executive branch had the right to function as "supreme legislator, supreme judge, and supreme executive."[15] As Chief Justice Rehnquist has observed, *Milligan* "is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime."[16]

C. World War I: The Espionage Act of 1917

When the United States entered World War I, there was widespread opposition to both the war and the draft. Many citizens argued that our goal was not to "make the world safe for democracy," but to protect the investments of the wealthy, and that this cause was not worth the life of one American soldier.

President Wilson had little patience for such dissent. He warned that disloyalty "must be crushed out" of existence[17] and declared that disloyalty "was . . . not a subject on which there was room for . . . debate." Disloyal

(1991); William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998).

[14] 4 Wall. (71 U.S.) 2 (1866).

[15] Rehnquist, *supra*, at 121 (quoting the brief filed on behalf of the government in *Milligan*).

[16] *Id.* at 137.

[17] David M. Kennedy, *Over Here: The First World War and American Society* (1980) (quoting Woodrow Wilson's Third Annual Message to Congress).

individuals, he explained, "had sacrificed their right to civil liberties."[18]

Shortly after the United States entered the war, Congress enacted the Espionage Act of 1917.[19] Although the Act was not directed at dissent as such, aggressive federal prosecutors and compliant federal judges soon transformed the Act into a blanket prohibition of seditious utterance.[20] The Wilson administration's intent was made clear in November 1917 when Attorney General Charles Gregory, referring to war dissenters, announced: "May God have mercy on them[,] for they need expect none from an outraged people and an avenging Government."[21]

In fact, the government worked hard to create an "outraged people." Because there had been no direct attack on the United States, and no direct threat to our national security, the Wilson administration had to generate a sense of urgency and a mood of anger in order to exhort Americans to enlist, to contribute money, and to make the many sacrifices that war demands. To this end, Wilson established the Committee for Public Information (CPI), which produced a flood of inflammatory and often misleading pamphlets, news releases, speeches, editorials, and motion pictures, all

[18] Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 53 (1979) (quoting Woodrow Wilson's Third Annual Message to Congress).

[19] Espionage Act (Barbour Espionage Act), Pub. L. No. 65-24, ch. 30, 40 Stat. 217 (1917).

[20] *See* Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. Chi. L. Rev. 335 (2003); Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 Sup. Ct. Rev. 411 (2002).

[21] *All Disloyal Men Warned By Gregory*, N.Y. Times, Nov. 21, 1917, at 3.

designed to instill a hatred of all things German and to attack the loyalty of those who questioned the war.[22]

There was widespread, and completely unfounded, fear that swarms of German spies and saboteurs roamed the country. In the first month of the war, Attorney General Gregory asked loyal Americans to act as voluntary detectives and to report their suspicions directly to the Department of Justice. The results were staggering. Each day, thousands of accusations of disloyalty flooded into the Department.[23]

Adding to the furor, the CPI encouraged citizens to form voluntary associations dedicated to informing the authorities of any incidents of possible disloyalty.

By the end of the war, the excesses of these organizations began to generate negative public reaction, and the Department of Justice attempted, with little success, to restrain their operations. In a memo to all United States Attorneys, the Department noted that the "protection of loyal persons from unjust suspicion . . . is quite as important as the suppression of actual disloyalty."[24] After the war ended, Assistant Attorney General John Lord O'Brian conceded that although these organizations "did much good," they were also one of the "chief embarrassments" caused by the "war mania." Because of their excessive zeal, they "interfered with the civil rights of many people" and contributed greatly "to the oppression of innocent men." In this respect, O'Brian observed, "the systematic and indiscriminate agitation against what was claimed to be an all-pervasive system" of

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[22] *See* Harry N. Scheiber, *The Wilson Administration and Civil Liberties: 1917-1921* 16-17 (1960).

[23] Murphy, *supra*, at 94-95; Meirion Harries and Susie Harries, *The Last Days of Innocence: America at War 1917-1918* 307 (1997).

[24] Letter from Thomas W. Gregory to U.S. Attorneys, (Oct. 28, 1918), *in* U.S. Department of Justice, *Annual Report of the Attorney General of the United States for the Year 1918* 674 (1918).

disloyalty did serious damage to the American people.[25] George Creel, who had served as director of the CPI, wrote years later that the organizations which he had helped to create were "the most obnoxious of the hysteria manufacturing bodies, whose patriotism was, at the time, a thing of screams, violence and extremes."[26]

When all was said and done, Wilson, Gregory and Creel had helped foster "a divided, fearful, and intolerant nation."[27]

It was in this atmosphere of accusation and suspicion that federal judges were called upon to interpret and apply the Espionage Act of 1917.

The Government prosecuted more than 2,000 dissenters for expressing their opposition to the war or the draft. In the atmosphere of fear, hysteria and clamor, most judges were quick to mete out severe punishment – often 10 to 20 years in prison – to those deemed disloyal. The result was the suppression of all genuine debate about the merits, morality and progress of the war.[28] But even this was not enough. Less than a year after adopting the Espionage Act, Congress enacted the Sedition Act of 1918, which declared it unlawful for any person to publish any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government, the Constitution, or the flag of the United States.[29]

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[25] Murphy, *supra,* at 127 (quoting Assistant Attorney General John Lord O'Brian).

[26] George Creel, *Rebel at Large: Recollections of Fifty Crowded Years* 196 (1947).

[27] Harries and Harries, *supra*, at 308.

[28] *See* Zechariah Chafee, Jr., *Free Speech in the United States* 52 (1941).

[29] Sedition Act of 1918, Pub. L. No. 65-150, ch. 75, 40 Stat. 553 (May 16, 1918) (repealed 1921).

The story of the Supreme Court in this era is too familiar, and too painful, to bear repeating in detail. In a series of decisions in 1919 and 1920 – most notably *Schenck*,[30] *Debs*,[31] and *Abrams*[32] – the Court consistently upheld the convictions of individuals who had agitated against the war and the draft – individuals as obscure as Mollie Steimer, a twenty-year-old Russian-Jewish émigré who had thrown anti-war leaflets written in Yiddish from a rooftop on the lower East Side of New York, and as prominent as Eugene Debs, who had received almost a million votes in 1912 as the Socialist Party candidate for President. As Harry Kalven once observed, the Court's performance was "simply wretched."[33]

In 1921, after all the dust had settled, Congress quietly repealed the Sedition Act of 1918.[34] Between 1919 and 1923, the government released from prison every individual who had been convicted under the Espionage and Sedition Acts. A decade later, President Roosevelt granted amnesty to all of these individuals, restoring their full political and civil rights. Over the next half-century, the Supreme Court overruled every one of its World War I decisions, implicitly acknowledging that the individuals who had been imprisoned for their dissent in this era had been punished for speech that should have been protected by the First Amendment.[35]

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[30] *Schenck v. United States*, 249 U.S. 47 (1919).

[31] *Debs v. United States*, 249 U.S. 211 (1919).

[32] *Abrams v. United States*, 250 U.S. 616 (1919).

[33] Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 147 (1988).

[34] Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359-60.

[35] *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

D. The Red Scare: 1919-1920

The Russian Revolution generated deep anxiety in the United States. A series of violent strikes and spectacular bombings triggered the period of public paranoia that became known as the "Red Scare" of 1919-1920. Attorney General A. Mitchell Palmer announced that the bombings were an "attempt on the part of radical elements to rule the country."[36]

Palmer established the "General Intelligence Division" within the Bureau of Investigation and appointed J. Edgar Hoover to gather and coordinate information about radical activities. The GID fed the Red Scare by aggressively disseminating sensationalized and often unwarranted charges that Communists and other radicals had instigated violent strikes and race riots.[37] The GID unleashed a horde of undercover agents to infiltrate radical organizations. From November 1919 to January 1920, the GID conducted a series of raids in thirty-three cities. More than 5,000 people were arrested on suspicion of radicalism. Attorney General Palmer described the "alien filth" captured in these raids as creatures with "sly and crafty eyes … lopsided faces, sloping brows and misshapen features" with minds tainted by "cupidity, cruelty, insanity, and crime."[38] More than a thousand individuals were summarily deported.

In the spring of 1920, a group of distinguished lawyers and law professors, including Ernst Freund, Felix Frankfurter and Roscoe Pound, published a report on the activities of the Department of Justice, which carefully documented that the

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[36] Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920* 9 (1955) (quoting Attorney General A. Mitchell Palmer).

[37] *See* Robert J. Goldstein, *Political Repression in Modern America: From 1870 to the Present* 150 (1978).

[38] *Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearing Before the House Comm. on Rules*, 66th Cong. 27 (1920).

government had acted without legal authorization and without complying with the minimum standards of due process.[39] As the *Christian Science Monitor* observed in June 1920, "in the light of what is now known, it seems clear that what appeared to be an excess of radicalism" was met with a real "excess of suppression."[40] In 1924, Attorney General Harlan Fiske Stone ordered an end to the Bureau of Investigation's surveillance of political radicals. "A secret police," he explained, is "a menace to free government and free institutions."[41] Charles Evans Hughes summarized the Red Scare in June of 1920:

> We have seen the war powers, which are essential to the preservation of the nation in time of war, exercised broadly after the military exigency has passed . . . and we may well wonder in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged.[42]

E. World War II: Internment

On December 7, 1941, Japan attacked Pearl Harbor. Two months later, on February 19, 1942, President Roosevelt signed Executive Order 9066, which authorized the Army to designate "military areas" from which "any or all persons

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[39] *See* Nat'l Popular Government League, *Report upon the Illegal Practices of the United States Department of Justice* (1920).

[40] Christian Science Monitor, June 25, 1920.

[41] Max Lowenthal, *The Federal Bureau of Investigation* 298 (1950) (quoting Attorney General Harlan Fiske Stone).

[42] Charles Evan Hughes, Address at Harvard Law School (June 21, 1920) *excerpted in* Chafee, *supra*, at 102.

may be excluded."[43] Although the words "Japanese" or "Japanese American" never appeared in the Order, it was understood to apply only to persons of Japanese ancestry.

Robert Jackson observed that Roosevelt "had a tendency to think in terms of right and wrong, instead of terms of legal and illegal. Because he thought that his motives were always good for the things that he wanted to do, he found difficulty in thinking that there could be legal limitations on them."[44]

Over the next eight months, 120,000 individuals of Japanese descent were forced to leave their homes in California, Washington, Oregon and Arizona. Two-thirds of these individuals were American citizens, representing almost 90% of all Japanese-Americans. No charges were brought against these individuals; there were no hearings; they did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. Many families lost everything.

On the orders of military police, these individuals were transported to one of ten internment camps, which were located in isolated areas in wind-swept deserts or vast swamp lands. Men, women and children were placed in overcrowded rooms with no furniture other than cots. They found themselves surrounded by barbed wire and military police, and there they remained for three years.[45]

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[43] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Congress implicitly ratified the Executive Order by providing that violation of the order of a military commander within a zone designated by the Army as a "military area" was unlawful. Act of Mar. 21, 1942, Pub. L. No. 77-503, ch. 191, 56 Stat. 173 (repealed 1976).

[44] Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt* 59, 68, 74 (Robert Q. Barrett, ed., 2003).

[45] *See* Comm'n on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982); Tetsuden Kashima, *Judgment without Trial: Japanese American Imprisonment during World War II* (2003).

In *Korematsu v. United States*,[46] this Court, in a six-to-three decision, upheld the President's action, and in *Hirabayashi v. United States*,[47] this Court upheld the constitutionality of the related curfew order. In *Korematsu*, the Court offered the following explanation:

> [We] are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . .
>
> Korematsu was not excluded from the [West Coast] because of hostility to . . . his race, [but] because . . . the military authorities . . . decided that the [] urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the [area]. . . . We cannot – by availing ourselves of the calm perspective of hindsight – say that these actions were unjustified.[48]

On the same day that it upheld the relocation orders, this Court imposed an important – though belated – limitation on the program. In *Ex parte Endo*,[49] this Court held that *detention* (unlike the initial order of relocation) could not be imposed on a loyal and law-abiding citizen. The Government had argued that detention to permit "a planned and orderly relocation" was essential. But this Court held that because detention touches the most sensitive of rights, "any such implied power must be narrowly confined to the precise purpose of the evacuation program."[50]

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[46] 323 U.S. 214 (1944).

[47] 320 U.S. 81 (1943).

[48] 323 U.S. at 219-20, 223-24.

[49] 323 U.S. 283 (1944).

[50] *Id.* at 296, 302.

In *Endo*, this Court recognized, "He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."[51] Accordingly, the Court concluded, loyal, law-abiding detainees were entitled to immediate release, notwithstanding the government's claimed need to continue detaining them for the successful administration of the relocation program.

Unfortunately, the *Endo* decision was not announced until December 18, 1944 – one day after the Roosevelt administration announced that it would release the internees. The timing was no accident. There is good reason to believe that the Court intentionally delayed its decision to allow the President rather than the Court to end the internment.[52] Although Secretary of War Stimson made clear to Roosevelt in May 1944 that the internment could be ended "without danger to defense considerations," the President postponed any such decision. Roosevelt did not want to release the internees until after the 1944 presidential election because such a decision might upset voters on the West Coast. As Peter Irons has concluded, the President's "desire for partisan advantage in the 1944 elections provides the only explanation for the delay in ending internment."[53]

Many participants in the Japanese internment later reflected on their roles. Some knew at the time that internment was unconstitutional and immoral. In April 1942, Milton Eisenhower, the National Director of the War Relocation Administration, which was responsible for running the detention camps, predicted sadly that "when this

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[51] *Id.* at 302.

[52] Eric K. Yamamoto, *et al.*, *Race, Rights and Reparation: Law and the Japanese American Internment* 174-75 (2001). *See also* Peter Irons, *Justice at War* 344-45 (1983).

[53] Irons, *supra*, at 273-77.

war is over . . . we, as Americans, are going to regret the . . . injustices" we have done. Two months later, he resigned his position.[54]

Francis Biddle, who as Attorney General had vigorously (but confidentially) opposed internment, wrote in 1962 that the episode showed "the power of suggestion which a mystic cliché like 'military necessity' can exercise on human beings." Because of a "lack of independent courage and faith in American reality," the nation missed a unique opportunity to "assert the human decencies for which we were fighting."[55]

Years before he was appointed to this Court, Tom Clark served as an Assistant Attorney General responsible for criminal prosecutions arising out of violation of the internment orders.[56] Upon retiring from the Supreme Court in 1966, Justice Clark stated that "I have made a lot of mistakes in my life. . . . One is my part in the evacuation of the Japanese from California. . . . [A]s I look back on it – although at the time I argued the case – I am amazed that the Supreme Court ever approved it."[57]

On February 19, 1976, as part of the celebration of the American Bicentennial, President Gerald Ford issued Presidential Proclamation No. 4417, in which he acknowledged that, in the spirit of celebrating our history, we must recognize "our national mistakes as well as our national achievements."[58] "February 19th," he noted, "is the anniversary of a sad day in American history," for it was "on that date in 1942 . . . that Executive Order No. 9066 was

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[54] *See id.* at 72.

[55] Francis Biddle, *In Brief Authority* 212, 226 (1962).

[56] *See id.* at 216-19; Irons, *supra*, at 119.

[57] John D. Weaver, *Warren: The Man, The Court, The Era* 113 (1967).

[58] Proclamation No. 4417, 41 Fed. Reg. 35,7741 (Feb. 19, 1976).

issued."[59] President Ford observed that "[w]e now know what we should have known then" – that the evacuation and internment of these individuals was "wrong." Ford concluded by calling "upon the American people to affirm with me this American Promise – that we have learned from the tragedy of that long-ago experience" and "resolve that this kind of action shall never again be repeated."[60]

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order No. 9066. The Commission was composed of former members of Congress, the Supreme Court and the Cabinet, as well as distinguished private citizens. In 1982, the Commission unanimously concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity.[61]

Shortly thereafter, federal courts granted writs of *coram nobis* vacating the convictions in the *Korematsu* and *Hirabayashi* cases. The courts found that at the time of the internment decision, government officials not only knew that there was no military necessity but in fact had intentionally deceived this Court about the circumstances.[62]

In its original version, General DeWitt's Report, which was designed to justify the military orders, did not "purport to rest on any military exigency, but instead declared that because of traits peculiar to citizens of Japanese ancestry it

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[59] *Id.*

[60] *Id.*

[61] Comm'n on Wartime Relocation and Internment of Civilians, *supra*, at 8.

[62] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). *See also* Eric K. Yamamoto and Susan Kiyomi Serrano, *The Loaded Weapon*, 29 Amerasia Journal 51 (2002).

would be impossible to separate the loyal from the disloyal."[63] Yet when officials of the War Department received the original version, they directed DeWitt to excise its racist overtones and add statements of military necessity. Copies of the original version were burned. When officials of the Justice Department were preparing to brief *Hirabayashi* in the Supreme Court, they sought all materials relevant to General DeWitt's decisionmaking. The War Department did not disclose to the Department of Justice the original version of the Report.[64] Over the objections of several officials in the Department of Justice, the War Department insisted on modifying the language of the United States' brief to this Court. The compromise language ultimately presented to this Court obfuscated the military necessity issue and did not alert the Court to inaccuracies in the final version of DeWitt's Report.[65]

In vacating Fred Korematsu's forty-year-old conviction because it was the result of "manifest injustice," the court emphasized the need for both executive branch accountability and careful judicial review:

> [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. . . .[66]

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[63] *Hirabayashi*, 828 F.2d at 598.

[64] *See* Irons, *supra*, at 206-18, 278-310.

[65] *Korematsu*, 584 F. Supp. at 1417-18. *See* Yamamoto, et al., *supra,* at 293-330; Irons, *supra,* at 206-18; Peter Irons, *Fancy Dancing in the Marble Palace*, 3 Const. Comment. 35, 39-41 (1986).

[66] *Korematsu*, 584 F. Supp. at 1420.

In 1988, President Reagan signed the Civil Liberties Act of 1988, which officially declared the Japanese internment a "grave injustice" that had been "carried out without adequate security reasons," and offered a formal presidential apology and reparations to each Japanese-American who had been interned along with a formal presidential apology for the discrimination, loss of liberty, loss of property and personal humiliation they had suffered.[67]

This Court's decision in *Korematsu* has become a constitutional pariah. This Court has never cited it with approval of its result.[68]

F. The Cold War: Loyalty Oaths and McCarthyism

As World War II drew to a close, the nation moved almost seamlessly into the Cold War. With the glow of our wartime alliance with the Soviet Union evaporating, President Truman came under increasing attack by those who sought to exploit fears of Communist aggression. The issue of "loyalty" quickly became a shuttlecock of party politics. By 1948, President Truman was boasting on the stump that he had imposed on the federal civil service the most extreme loyalty program in the "Free World."[69]

But there were limits to Truman's anti-communism. In 1950, he vetoed the McCarran Act, which required the registration of all Communists. Truman's Attorney General

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[67] Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

[68] *See* Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 Sup. Ct. Rev. 455, 485 at n. 99 (2002).

[69] *See* David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* 15-33 (1978).

labeled the Act a product of public "hysteria."[70] Truman argued that the "internal security of the United States is not seriously menaced by the communists in this country," whom he termed a "noisy but small and universally despised group." He charged that those who claimed that the nation was in peril from domestic subversion had "lost all proportion, all sense of restraint, all sense of patriotic decency."[71] Yet Congress passed the Act over Truman's veto.[72]

In 1954, Congress enacted the Communist Control Act,[73] which stripped the Communist Party of "all rights, privileges, and immunities." Only one Senator, Estes Kefauver, dared to vote against it. Irving Howe lamented "this Congressional stampede to . . . trample . . . liberty in the name of destroying its enemy."[74]

Hysteria over the "Red Menace" swept the nation and generated a wide range of federal, state and local restrictions on free expression and free association, including extensive loyalty programs for government employees; emergency detention plans for alleged "subversives"; abusive legislative investigations designed to punish by exposure; public and private blacklists of those who had been "exposed"; and

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[70] C.P. Trussell, *Congress Passes Bill to Curb Reds By Heavy Margins*, N.Y. Times, Sept. 21, 1950, at 1 (quoting Attorney General J. Howard McGrath).

[71] Robert Griffith, *The Politics of Fear* 88-89 (1970); President Harry S. Truman, Address in Kiel Auditorium, St. Louis (Nov. 4, 1950); Lowenthal, *supra*, at 450-51; Goldstein, *supra*, at 328.

[72] Internal Security (McCarran) Act of 1950, Pub. L. No. 81-831, ch. 1024, 64 Stat. 987 (1950).

[73] Communist Control Act of 1954, Pub. L. No. 83-886, ch. 886, 68 Stat. 775 (1954).

[74] Irving Howe, *The Shame of U.S. Liberalism,* 1 Dissent 308 (Autumn, 1954).

criminal prosecutions of the leaders and members of the Communist Party of the United States.[75]

This Court's response was mixed. The key decision was *Dennis v. United States*,[76] which involved the direct prosecution under the Smith Act of the leaders of the American Communist Party. The Court held that the defendants could constitutionally be punished for their speech under the clear and present danger standard – even though the danger was neither clear nor present. It was a memorable feat of judicial legerdemain.[77]

Over the next several years, the Court upheld far-reaching legislative investigations of "subversive" organizations and individuals and the exclusion of members of the Communist Party from the bar, the ballot and public employment.[78] In so doing, the Court clearly put its stamp of approval on an array of actions we look back on today as models of McCarthyism. In later years, the Court effectively overruled *Dennis* and its progeny, recognizing once again that the nation had been led astray by the emotions and fears of the moment.[79]

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[75] *See generally* Ralph S. Brown, *Loyalty and Security* (1958); Caute, *supra*; Frank Donner, *The Age of Surveillance: The Aims and Methods of America's Political Intelligence System* (1980); Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (1978).

[76] 341 U.S. 494 (1951).

[77] *See* Kalven, *supra*, at 211; William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375 (2001).

[78] *See, e.g, Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Adler v. Bd. of Educ. of New York*, 342 U.S. 485 (1952); *Barenblatt v. United States*, 360 U.S. 109 (1959).

[79] *See, e.g., Yates v. United States*, 354 U.S. 298 (1957) (narrowly construing the Smith Act); *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

II. ASSERTIONS OF EXECUTIVE PREROGATIVE AND MILITARY NECESSITY SHOULD BE SCRUTINIZED CLOSELY TO AVOID YET ANOTHER MISTAKEN AND UNNECESSARILY RESTRICTIVE CURTAILMENT OF CIVIL LIBERTIES

As in the past, the issues these cases raise involve a direct conflict between our civil liberties and a threat to our safety and security. That we have made mistakes in the past does not mean we should make another, perhaps more serious mistake now. We should learn from our experience.

During World War I, John Lord O'Brian served as Special Assistant Attorney General in charge of the War Emergency Division of the Department of Justice. In this capacity, he played a central role in enforcing the Espionage Act of 1917. Four decades later, reflecting on his own experience, O'Brian cautioned against the "emotional excitement engendered . . . during a war," and warned that "the greatest danger to our institutions" may rest, not in the threat of subversion, but "in our own weaknesses in yielding" to wartime anxiety and our "readiness to . . . disregard the fundamental rights of the individual." He expressed the hope that "our judges will in the end establish principles reaffirming" our nation's commitment to civil liberties.[80]

As Chief Justice Rehnquist has written, "[i]t is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power [sought to be exercised is] either dubious or nonexistent."[81] It is, he

(rejecting the *Dennis* version of clear and present danger); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (holding unconstitutional anti-Communist loyalty oath for public employees).

[80] John Lord O'Brian, *New Encroachments on Individual Freedom*, 66 Harv. L. Rev. 1, 3, 26 (1952). *See also* John Lord O'Brian, *Changing Attitudes Toward Freedom*, 9 Wash. & Lee L. Rev. 157 (1952).

[81] Rehnquist, *supra*, at 224.

added, "both desirable and likely that more careful attention will be paid by the courts to the . . . government's claims of necessity as a basis for curtailing civil liberty."[82]

This Court has a profound responsibility to help guide our nation in the extraordinary circumstances of wartime. It has been said that in such circumstances the Court may grant too much deference to the other branches of government to avoid inadvertently hindering the war effort.[83] *Korematsu* and *Dennis* are examples of this phenomenon.

But the lesson of those decisions is not that this Court should abdicate its responsibility. It is, rather, that the Court should bring to its responsibility an even deeper commitment to preserving the liberties for which this nation has fought. The Court's confident exercise of that responsibility is essential to enabling our nation to strike the *right* balance in times of crisis.

This Court has often demonstrated that commitment, seeking – *even in the midst of war* – to restrain the tendency to compromise essential liberties. The *Endo* decision, *supra*, holding that the internment camps for Japanese-Americans were illegal, was reached in 1944, while the Second World War was still being fought (though it was issued a day after the President announced his intention to close the camps). In *Schneiderman v. United States*,[84] and *Baumgartner v. United States*,[85] the Court held, over strong executive branch objections, that the United States could not constitutionally denaturalize an individual for speech or association unless it could prove by clear and convincing evidence that the individual had personally endorsed "present violent action which creates a clear and present danger of public disorder or

[82] *Id.* at 225.

[83] *See id.* at 222.

[84] 320 U.S. 118 (1943).

[85] 322 U.S. 665 (1944).

other substantive evil."[86] *Schneiderman* and *Baumgartner* effectively ended the government's campaign during World War II to denaturalize former members of the German-American Bund and the Communist Party.

During the Korean conflict, this Court invalidated the President's seizure of steel mills, reasoning that the seizure, though based on an asserted need to maintain production of essential war materials, was not authorized by Congress or the Constitution.[87] In *United States v. Robel*,[88] this Court held unconstitutional a provision of the Subversive Activities Control Act of 1950 that prohibited members of any "Communist-action" organization from working "in any defense facility." The Court held that even in the context of defense facilities, and even at the height of the Cold War, the government must achieve its goals with carefully drawn regulations and with a due regard for First Amendment freedoms. And during the Vietnam War, this Court refused to stop publication of the top-secret "Pentagon Papers," despite executive branch claims that publication would endanger our troops in the field.[89]

Even more common are the instances when, after hostilities have ended, the courts have condemned wartime infringements of liberty and due process. As noted above, following the Civil War, this Court in *Milligan* held that the President had exceeded his authority by suspending the writ of habeas corpus when the civil courts were open and functioning.[90] During World War I and the 1919-1920 Red Scare, the Court allowed the rights of "agitators" to be

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[86] *Schneiderman*, 320 U.S. at 157-159.

[87] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[88] 389 U.S. 258 (1967).

[89] *New York Times Co. v. United States*, 403 U.S. 713 (1971).

[90] 71 U.S. 2 (1866).

severely restricted,[91] but thereafter recognized existing protections for political speech and activities in support of unpopular causes.[92] In the wake of World War II, this Court upheld the issuance of writs of *habeas corpus* to release two individuals who had been detained and convicted during the war under a regime of martial law imposed in Hawaii.[93] The Court in that case reasoned that "[c]ourts and their procedural safeguards are indispensable to our system of government," and it held that even with Congress's *express* approval of "martial law" in the islands, the executive branch had exceeded its authority when it supplanted Hawaiian courts with military tribunals.[94] The period following the McCarthy Era (although not technically the aftermath of a war) was similarly characterized by court decisions protecting liberties that had been infringed during that era.[95]

Of course, in this case, the Government would not allow even for these post-war judicial "corrections" because the Government would not permit any review of its decision to detain the Petitioners indefinitely. This vision of the executive branch's authority is inconsistent with our constitutional commitment to a government of laws.

Let us not now set the foundation for later apologies and belated attempts to restore narrowed rights. Let us instead underscore the role of the courts in assuring the indispensable safeguards by which we are, and should be, measured as a just society.

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[91] *See supra*, notes 30-33 and accompanying text.

[92] *See Herndon v. Lowry*, 301 U.S. 242 (1937) (overturning, because of lack of evidence of incitement, the conviction of a Communist Party member).

[93] *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

[94] *Id.* at 322-23.

[95] *See supra*, note 79 and accompanying text.

This Court should make clear that even in wartime, the United States respects the principle that individuals may not be deprived of their liberty except for appropriate justifications that are demonstrated in fair hearings, in which they can be tested with the assistance of counsel. This Court should make clear that the United States does not constrict fundamental liberties in the absence of convincing military necessity. And even when such necessity is established, liberties can be restricted only while preserving some avenue for review comporting with the minimum required by due process.

Our failure to hold ourselves to this standard in the past has led to many of our most painful episodes as a nation. We should not make that mistake again.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

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